

Cheryl A. Williams (Cal. Bar No. 193532)
Kevin M. Cochrane (Cal. Bar No. 255266)
caw@williamscochrane.com
kmc@williamscochrane.com
WILLIAMS & COCHRANE, LLP
525 B Street, Suite 1500
San Diego, CA 92101
Telephone: (619) 793-4809

Attorneys for Plaintiff
PAUMA BAND OF MISSION INDIANS

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

**PAUMA BAND OF LUISENO MISSION
INDIANS OF THE PAUMA & YUIMA
RESERVATION**, a/k/a PAUMA LUISENO
BAND OF MISSION INDIANS, a/k/a PAUMA
BAND OF MISSION INDIANS, a federally
recognized Indian Tribe,

Plaintiff,

vs.

**STATE OF CALIFORNIA; CALIFORNIA
GAMBLING CONTROL COMMISSION**, an
agency of the State of California; and **ARNOLD
SCHWARZENEGGER**, as Governor of the
State of California;

Defendants.

Case No.: 09CV1955 AJB MDD

**PAUMA'S NOTICE OF MOTION AND
MOTION FOR PROTECTIVE ORDER;
OBJECTIONS TO AUGUST 23, 2011
ORDER PURSUANT TO FED. R. CIV. P.
72(A)**

Date: February 24, 2012
Time: 1:30 pm
Dept: 12
Judge: The Hon. Anthony J. Battaglia

TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that at 1:30 p.m. on February 24, 2012, or as soon thereafter as counsel may be heard, in Courtroom 12 of the Edward J. Schwartz United States Courthouse at 940 Front Street, San Diego, California 92101-8900, the Pauma Band of Mission Indians will move for a non-discovery related protective order to prevent all non-policy making attorneys with the Attorney General's Office, the Office of the Governor, and the California Gambling Control Commission from communicating with representatives of Pauma about the merits of the litigation without the presence or prior consent of the Tribe's counsel of record. Further, Pauma will also request that the Court order the State defendant's to produce all evidence of previous *ex parte* communications so the Tribe can determine the extent of any breach of the attorney client privilege and ensure that it will not affect the integrity of future proceedings before the district court.

While Pauma previously made a motion to prevent such communications under Federal Rule of Procedure 26(c) ("Rule 26(c)"), Magistrate Judge Dembin summarily denied the motion on the basis that it did not allege a discovery dispute. Because the merits of the motion were never addressed, Pauma brings this current motion, outside of the umbrella of Rule 26(c), to seek alternate relief in the form of a protective order generally. In addition, the present motion also includes objections to Judge Dembin's order denying the motion pursuant to Federal Rule of Procedure Rule 72(a) for purposes of preserving Pauma's rights on appeal.

The reason Pauma moves at this juncture is that the State alleges that the only defense attorneys that are subject to California Rule of Professional Conduct 2-100 are the three whose names appear on the caption for the State's pleadings. This narrow view of Rule 2-100 enables the State to claim that a senior attorney advisor with the Office of the Governor – as well as any other attorney from the Attorney General's Office or one of the other named offices and agencies – can communicate *ex parte* with representatives of Pauma about the merits of the litigation and the potential for settlement without the presence or advance consent of the Tribe's counsel of record. It also shields the State from disclosing the extent of this attorney's prior unpermitted *ex parte* contacts and whether those contacts exposed information protected by the attorney/client privilege. At a minimum, Pauma respectfully requests the Court's guidance in determining the applicability of Rule 2-100 to the implicated attorney in order to

1 resolve the present situation and prevent further disruptions in the proceedings. This motion is based on
2 the accompanying memorandum of points and authorities; the new declaration of Cheryl A. Williams;
3 and all evidence submitted herewith, including the prior *ex parte* motion for a protective order and its
4 associated declarations.

5 DATED this 6th day of September, 2011.

6 THE PAUMA BAND OF MISSION INDIANS

7 By: /s/ Kevin M. Cochrane

8 Cheryl A. Williams

9 Kevin M. Cochrane

10 caw@williamscochrane.com

11 kmc@williamscochrane.com

12 WILLIAMS & COCHRANE, LLP

13 525 B Street, Suite 1500

14 San Diego, California 92101

15 Telephone: (619) 793-4809

TABLE OF CONTENTS

INTRODUCTION.....	1
STATEMENT OF FACTS	3
LEGAL STANDARD	11
OBJECTIONS TO ORDER ON EX PARTE MOTION	11
I. SUMMARY OF OBJECTIONS	11
II. EXPLANATION OF OBJECTIONS	12
A. OBJECTION NO. 1: THE ORDER IS CONTRARY TO NINTH CIRCUIT PRECEDENT REQUIRING COURTS TO EXAMINE ALLEGATIONS OF UNETHICAL CONDUCT	12
B. OBJECTION NO. 2: THE ORDER IS CONTRARY TO LAW REQUIRING COURTS TO LOOK PAST TECHNICAL DEFECTS IN ORDER TO ADDRESS ALLEGATIONS OF ETHICAL MISCONDUCT	13
C. OBJECTION NO. 3: THE ORDER’S WHOLESALE ADOPTION OF THE STATE’S ARGUMENT THAT JACOB APPELSMITH IS NOT PARTICIPATING AS AN ATTORNEY IN THIS MATTER IS BOTH CLEARLY ERRONEOUS AND CONTRARY TO LAW	14
ARGUMENT	15
I. AS THE STATE’S PRINCIPAL NEGOTIATOR OF TRIBAL/STATE GAMING COMPACTS LIKE THE ONE HEREIN INVOLVED, JACOB APPELSMITH VIOLATED RULE 2-100 BY ENGAGING IN EX PARTE COMMUNICATIONS WITH REPRESENTATIVES FROM PAUMA FOR THE PURPOSE OF ATTEMPTING TO SETTLE THE CASE WITHOUT THE KNOWLEDGE OF THE TRIBE’S COUNSEL OF RECORD	15
A. JACOB APPELSMITH REPRESENTS THE OFFICE OF THE GOVERNOR IN ALL GAMING COMPACT MATTERS	16
B. EACH TRIBAL COUNCIL MEMBER QUALIFIES AS A PARTY TO THE LAWSUIT	21
C. THE PUBLIC OFFICER EXCEPTION DOES NOT EXEMPT JACOB APPELSMITH FROM RULE 2-100’S PROHIBITION ON EX PARTE COMMUNICATIONS	23
D. THE REQUESTED RELIEF IS CUSTOMARY IN CASES INVOLVING EX PARTE COMMUNICATIONS	25
CONCLUSION.....	26

TABLE OF AUTHORITIES

CASES

<i>Abeles v. State Bar,</i> 9 Cal.3d 603 (1973)	15, 19
<i>Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. State of Cal.,</i> 618 F.3d 1066 (9th Cir. 2010)	17
<i>Cleland v. Superior Court,</i> 52 Cal.App.2d 530 (3d Dist. 1942)	23, 24
<i>Empire Linotype School v. U.S.,</i> 143 F.Supp. 627 (S.D.N.Y. 1956)	11
<i>Erickson v. Newmar Corp.,</i> 87 F.3d 298 (9th Cir. 1996)	11, 13
<i>Ferrara v. La Sala,</i> 186 Cal.App.2d 263 (2d Dist. 1986)	17
<i>Gas-a-Tron of Az. v. Union Oil Co. of Cal.,</i> 534 F.2d 1322 (9th Cir. 1976)	1, 10, 11, 12, 13
<i>Hammond v. City of Junction, Kan.,</i> 167 F.Supp.2d 1271 (D. Kan. 2001)	1, 10, 11, 12, 13, 25
<i>Hewlett Packard Co. v. Superior Court,</i> 252 Cal.Rptr. 14 (4th Dist. 1988)	21
<i>Holland v. Island Creek Corp.,</i> 885 F. Supp. 4 (D.D.C. 1995)	14
<i>In re Dale,</i> 2005 WL 1389226 (Cal.Bar Ct. 2005)	16
<i>Libarian v. State Bar,</i> 21 Cal.2d 862 (1943)	15, 20
<i>Miller v. Metzinger,</i> 91 Cal.App.3d 31 (2d Dist. 1979)	17
<i>Mills Land & Water Co. v. Golden W. Refining Co.,</i> 186 Cal.App.3d 116 (4th Dist. 1986)	21
<i>Mitton v. State Bar,</i> 71 Cal.2d 524 (1969)	16

1	<i>Perkins v. W. Coast Lumber Co.,</i>	
2	129 Cal. 427 (1900)	17
3	<i>Resnick v. Am. Dental Ass’n,</i>	
4	95 F.R.D. 372 (N.D. Ill. 1982)	7, 25
5	<i>Responsible Citizens v. Superior Court,</i>	
6	16 Cal.App.4th 1717 (5th Dist. 1993)	17
7	<i>Richardson v. Hamilton Int’l Corp.,</i>	
8	469 F.2d 1382 (3d Cir. 1972)	10
9	<i>Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger,</i>	
10	602 F.3d 1019 (9th Cir. 2010)	17
11	<i>Silver v. Executive Car Leasing Disability Plan,</i>	
12	466 F.3d 727 (9th Cir. 2006)	14
13	<i>Smallberg v. State Bar,</i>	
14	212 Cal. 113 (1931)	15, 18
15	<i>Trone v. Smith,</i>	
16	621 F.2d 994 (9th Cir. 1980)	13
17	<i>Trust Corp. of Mont. v. Piper Aircraft Corp.,</i>	
18	701 F.2d 85 (9th Cir. 1983)	11
19	<i>Turnball v. Topeka State Hospital,</i>	
20	185 F.R.D. 645 (D. Kan. 1999)	1, 10, 11, 12, 13
21	<i>Turner v. State Bar,</i>	
22	36 Cal.2d 155 (1950)	15, 19
23	<i>U.S. v. Lopez,</i>	
24	4 F.3d 1455 (9th Cir. 1993)	23
25	<i>U.S. v. Sierra Pac. Indus.,</i>	
26	759 F.Supp.2d 1215 (E.D. Cal. 2011)	10, 16, 24
27	<i>U.S. v. Talao,</i>	
28	222 F.3d 1133 (9th Cir. 2000)	16, 23
	<i>U.S. ex rel. O’Keefe v. McDonnell Douglas Corp.,</i>	
	132 F.3d 1252 (8th Cir. 1998)	11, 25
	<i>Westinghouse Elec. Corp. v. Kerr-McGee Corp.,</i>	
	580 F.2d 1311 (7th Cir. 1978)	17

DOCKET CITES

<i>Pauma Band of Mission Indians v. State of Cal.</i> , Civ. Case No. 09-01955 AJB MDD (S.D. Cal. filed on Sep. 4, 2009)	1, 5, 7, 9, 10
<i>U.S. v. Sierra Pac. Indus.</i> , No. 09-02245 JAM EFB (E.D. Cal Nov. 15, 2010)	25

STATUTES

Indian Gaming Regulatory Act 25 U.S.C. § 2701 <i>et seq.</i>	2
Cal. Gov't Code	
§ 1001	4
§ 1300	4
§ 1303	4, 23
§ 1320	4
§ 1321	4
§ 6250 <i>et seq.</i>	6

RULES AND REGULATIONS

Federal Rules of Civil Procedure	
26(c)	1, 7, 10, 11, 12, 13
72(a)	1
Restatement (Third) of Law Governing Law.	
§ 101(2)	24
§ 101 cmt. c	24
Civil Local Rules for the Southern District of California	
83.4(b)	16
American Bar Association's Model Rules of Professional Conduct	
2.1	17
4.2 cmt. 1	16
4.2 cmt. 4	20
4.2 cmt. 6	21
California Rules of Professional Conduct	
2-100	6, 8, 9, 10, 12, 13, 14, 15, 16, 21, 23, 25
2-100(B)(1)	21
2-100(C)(1)	23, 24

ETHICS OPINIONS

Formal Opinion No. 1988-103 of the State Bar of Cal.	
---	--

1	Formal Opinion No. 1991-125 of the State Bar of Cal.	15, 18
2	Formal Opinion No. 1993-132 of the State Bar of Cal.	17, 20
3	Proposed Formal Opinion Interim No. 98-0002 of the State Bar of Cal.	24
4	Opinion No. 09-1 of the Florida Bar (Dec. 10, 2010)	25
5	Formal Opinion No. 22 of the Idaho State Bar	19
6	Informal Ethics Opinion No. RI-145 of the State Bar of Mich. (Oct. 1, 1992)	19
7	Informal Ethics Opinion No. RI-166 of the State Bar of Mich. (June 3, 1993)	20
8	Opinion No. 652 of the N.Y. State Bar Ass’n (Aug. 27, 1993)	25
9	Opinion No. 768 of the N.Y. State Bar Ass’n (Oct. 8, 2003)	19
10	Opinion No. 812 of the N.Y. State Bar Ass’n (May 3, 2007)	25
11	Formal Opinion No. 2005-6 of the Or. State Bar (Aug. 2005)	19
12	Formal Opinion No. 2005-80 of the Or. State Bar (Aug. 2005)	21, 22
13	Opinion 17 of the State Bar of Texas, 18 Baylor L. Rev. 200 (Dec. 1948)	19
14	Advisory Opinion No. 1738 of the Wash. State Bar Ass’n (1997)	17
15	Advisory Opinion No. 1984 of the Wash. State Bar Ass’n (1997)	17
16	Ethics Opinion 1968-2 of the San Diego County Bar Ass’n (Dec. 3, 1968)	19
17	SECONDARY AUTHORITIES	
18	C.J.S. Attorney & Client (2011)	
19	7 § 42	11
20	OTHER AUTHORITIES	
21	Black’s Law Dictionary (6th abridged ed. 1991)	
22	Public Office	23
23	Merriam Webster (online)	
24	Advise	24
25	Public Officer	23
26		
27		
28		

GLOSSARY OF ABBREVIATIONS

ABBREVIATION

MEANING

AD

Declaration of Jacob A. Appelsmith in Support of Opposition to Ex Parte Application for Protective Order (attached to the accompanying Williams Declaration as Ex. C)

Appelsmith

Jacob A. Appelsmith, Esq., Senior Advisor for the Office of the Governor

General Council

The entire adult membership of Pauma, which possesses plenary power over the Tribe's affairs

Laird

Deputy Attorney General T. Michelle Laird, Counsel of Record for the State Defendants

LD

Declaration of T. Michelle Laird in Support of Opposition to Ex Parte Application for Protective Order (attached to the accompanying Williams Declaration as Ex. D)

MD

Declaration of Randall Majel in Support of Pauma's Prior Ex Parte Motion for a Protective Order (attached to the accompanying Williams Declaration as Ex. F)

Opp.

State Defendants' Opposition to Pauma's Ex Parte Application for Protective Order (attached to the accompanying Williams Declaration as Ex. E)

Pauma / Tribe

Plaintiff, the Pauma Band of Mission Indians

Rule 2-100

California Rule of Professional Conduct 2-100

State

Defendants, the State of California, California Gambling Control Commission ("CGCC" or "Commission"), and former Governor Arnold Schwarzenegger and his successors in interest

Tribal Council

The four-person executive body that carries out the General Council's orders and oversees Pauma's day-to-day affairs

WD

Declaration of Cheryl A. Williams in Support of Pauma's Prior Ex Parte Motion for a Protective

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WD2

*Order (attached to the accompanying Williams
Declaration as Ex. B)*

*Declaration of Cheryl A. Williams in Support of
this Motion for Protective Order*

INTRODUCTION

After sitting on the information for in excess of a week, on August 4, 2011, counsel of record for the State disclosed that a senior attorney advisor with the Office of the Governor planned on conducting a discreet settlement meeting with select anonymous members of the Pauma Band of Mission Indian's ("Pauma" or "Tribe") Tribal Council without the knowledge or consent of the Tribe's counsel of record. LD, ¶¶ 4, 6; WD, ¶ 2. Following another week's worth of stonewalling, on August 15, 2011, Pauma moved the Court *ex parte* for a protective order pursuant to Federal Rule of Civil Procedure 26(c) ("Rule 26(c)") to prevent all non-policy making attorneys with the Attorney General's Office, the California Gambling Control Commission ("CGCC"), and the Office of the Governor from communicating with members of the Tribe about the litigation without the consent of Pauma's counsel of record. WD, ¶¶ 3-11; *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. State of Cal.*, Civ. Case No. 09-01955, Docket No. 118 (S.D. Cal. March 15, 2011) ("*Pauma*"). Without reaching the merits, Magistrate Judge Dembin denied the motion on August 23, 2011, indicating that he lacked the power to issue the requested order under Rule 26(c) in the absence of an ongoing discovery dispute. *Pauma*, Docket No. 124 (S.D. Cal. Aug. 23, 2011). When handling identical requests, other district courts have disregarded the Rule 26(c) label and heard the motion, *see Hammond v. City of Junction, Kan.*, 167 F.Supp.2d 1271, 1275 (D. Kan. 2001) ("*Hammond*") (considering a Rule 26(c) motion for a protective order to prevent *ex parte* communications in order to ensure compliance with disciplinary and ethical rules); *Turnball v. Topeka State Hospital*, 185 F.R.D. 645, 651 (D. Kan. 1999) ("*Turnball*") (same); in order to satisfy their affirmative duty to investigate and address any allegation of unethical conduct by one of the attorneys. *Gas-a-Tron of Az. v. Union Oil Co. of Cal.*, 534 F.2d 1322, 1324 (9th Cir. 1976).

Seeking to cure the technical defect in the prior *ex parte* motion, Pauma now brings the present motion to request that the Court address the merits of the arguments and grant alternate relief in the form of a general protective order outside the scope of Rule 26(c). Should the Court choose not to hear this motion for any reason, this memorandum also sets forth Pauma's objections to Magistrate Judge Dembin's order on the *ex parte* motion following the Legal Standard section, *infra*, for the purposes of preserving the Tribe's rights on appeal. Unfortunately, the need for a protective order has not dissipated. As previously stated in the *ex parte* motion, the Office of the Governor is represented by a

1 senior attorney advisor in all negotiations for tribal/State gaming compacts and the settlement of related
 2 bad faith lawsuits under the Indian Gaming Regulatory Act. *See* 25 U.S.C. § 2701 *et seq.* This attorney
 3 contends that he is a party to the litigation, and consequently able to communicate directly with
 4 representatives from Pauma about the underlying facts of the litigation and the potential for settlement.
 5 AD, ¶¶ 3-5, 10.

6 The State's counsel of record joins in this sentiment and insists that the attorney does not actually
 7 perform any legal work in his role as the representative for the Office of the Governor for Indian affairs.
 8 Opp., 1:23-27. Yet, the admissions in the State's response to the *ex parte* motion indicate that this is not
 9 the case, as the attorney has the ability to renegotiate the terms of the contract at issue in this suit, review
 10 pleadings prepared by the Attorney General's Office, and provide final review of legal correspondence
 11 from the Attorney General's Office to Pauma's counsel. LD, ¶ 11; Opp., 1:23-27; 9:2-5. Each of these
 12 functions comports with those performed by the attorney's predecessor, Legal Affairs Secretary Andrea
 13 Hoch, who made no qualms about the true nature of her position. LD, ¶ 3. In addition to performing
 14 these purely legal tasks, the attorney's penchant for corresponding with Pauma's former counsel about
 15 the litigation indicates that he too recognizes that he's participating in this matter in a legal capacity
 16 rather than as a party who is immunized from the contact of adversarial attorneys. AD, ¶¶ 6, 10-12.

17 In light of these admissions, Pauma, at a minimum, requests a ruling on the applicability of Rule
 18 2-100 to this attorney. As indicated at the outset, the shape shifting nature of the attorney's involvement
 19 in this lawsuit poses more than a speculative future problem for Pauma. In his declaration, the State's
 20 attorney did not refute the allegation that he communicated with representatives from Pauma in the past
 21 about the subject matter of the litigation. In fact, the State dodged the issue by simply claiming, without
 22 support, that the attorney is not representing the Office of the Governor in this matter. Opp., 9:13-24.
 23 Additionally, in describing his most recent *ex parte* communications, the attorney passively admitted
 24 that "efforts were undertaken to coordinate a date and time" for the settlement conference, without
 25 explaining with whom those efforts were made. AD, ¶ 7. Considering all this, Pauma legitimately
 26 believes that the attorney may have acquired privileged information that the State could advance during
 27 future fact-based proceedings as the alleged fruit of a lawful discovery practice. To ascertain whether
 28 the State possesses such information, Pauma asks the Court to order the disclosure of all evidence

1 pertaining to the prior instances of unpermitted *ex parte* contact. Additionally, Pauma further requests
 2 that the Court issue a protective order prohibiting future communications of this sort so the Tribe's
 3 counsel of record can return its focus to the principal proceedings instead of having to vigilantly police
 4 the actions of the various attorneys for the State who are involved in this litigation *sub rosa* – including
 5 one who is intent on corresponding with everyone *but* Pauma's counsel of record. This remedy is
 6 necessary given the State's insistence that the Rules of Professional Conduct only apply to the three
 7 attorneys whose names appear on the caption of the State's pleadings. Opp., 8:14-16.

8 STATEMENT OF FACTS

9 Pauma is a federally-recognized Indian tribe in northern San Diego County with two hundred
 10 and twenty-eight members. WD, Exs. 10 ¶¶ 14, 18; 11. According to its Articles of Association, the
 11 body politic ("General Council") has plenary power over all internal affairs, including the retention of
 12 legal counsel and the approval of contracts and other arrangements with third parties. WD, Ex. 12, §
 13 6(A)-(C). The breadth of these powers leaves the four-person Tribal Council with relatively few
 14 prescribed duties. WD, Exs 11; 12, § 6(C). Aside from effectuating all previously approved resolutions
 15 and ordinances, the central responsibility of the Tribal Council is to "[r]epresent the Band in all
 16 negotiations between the Band and local, State and Federal Governments, their agencies and officers,"
 17 and to "[f]aithfully advise the General Council of all aforementioned negotiations." WD, Ex. 6, §
 18 6(C)(1)-(3). In carrying out these intergovernmental relations, the Chairman is designated as "the
 19 official representative of the Band." WD, Ex. 6, § 8(A). If so requested, the Vice-Chairman can assist
 20 in the performance of these negotiations. WD, Ex. 6, § 8(B). However, neither the Secretary/Treasurer
 21 nor the remaining Council member has an approved role in the process. WD, Ex. 6, § 8(C).

22 This procedure of conducting one-on-one negotiations with other sovereigns is common to all
 23 California tribes, as is evidenced by the seventy-nine Class III gaming compacts the Office of the
 24 Governor has executed with the relevant tribal chairpersons in this State. *See* California Gambling
 25 Control Commission, Ratified Tribal-State Compacts, <http://www.cgcc.ca.gov/?pageID=compacts> (last
 26 visited Aug. 13, 2011). In the compacting process, the tribal chairperson is not only the signatory to the
 27 final agreement, but the party responsible for conducting negotiations on behalf of his or her tribe or
 28 appointing the appropriate substitute proxy to do so. WD, Ex. 10, §§ 12.3, 13.0, 15.6. This arrangement

1 has remained constant over the past decade and was used by the present Governor twice this year when
 2 executing new compacts with the Habematolel Pomo of Upper Lake (“Upper Lake”) and the Pinoleville
 3 Pomo Nation (“Pinoleville”). Office of Governor Edmund G. Brown Jr., Tribal State Compact between
 4 the State of California and the Pinoleville Pomo Nation at §§ 15.3, 16.0, 18.7 (Aug. 8, 2011),
 5 http://gov.ca.gov/docs/Pinoleville_Compact.pdf (last visited Aug. 14, 2011); Office of the Governor
 6 Edmund G. Brown Jr., Tribal-State Compact between the State of California and the Habematolel Pomo
 7 of Upper Lake at §§ 15.3, 16.0, 18.7 (2011), http://gov.ca.gov/docs/Compact-3_22_11.pdf (last visited
 8 Aug. 14, 2011).

9 Representing the Office of the Governor throughout these two compact negotiations was an in
 10 house senior attorney advisor named Jacob Appelsmith. WD, ¶ 12; Exs. 13-14. Mr. Appelsmith is a
 11 rather distinguished attorney. After graduating from the University of California Boalt Hall School of
 12 Law, he spent six years working as a commercial litigator for Pillsbury, Madison & Sutro, a San
 13 Francisco based law firm that merged with other prestigious regional firms to form what is now known
 14 as Pillsbury Winthrop Shaw Pittman. WD, Exs. 15-16. After departing Pillsbury, Mr. Appelsmith spent
 15 the next sixteen years working for the Attorney General’s Office, ultimately achieving the rank of
 16 Special Assistant to Attorney General Edmund G. Brown, Jr. on law enforcement and criminal justice
 17 issues. WD, Exs. 15-16. When Attorney General Brown became Governor Brown, Mr. Appelsmith
 18 moved over to the Capitol with him as a senior advisor for Indian affairs. WD, Exs. 15-16.

19 Notably, this advisory position is not a public office.¹ A full listing of the State’s civil executive
 20 officers is set forth within Section 1001 of the Government Code. While the State may appoint
 21 additional officers, each particular instance requires a nomination by the Governor, confirmation by the
 22 Senate, and the recitation of the State oath of office by the chosen party. Cal. Gov’t Code §§ 1300,
 23 1303, 1320. After the completion of these three steps, the Senate will then deliver a certified copy of its
 24 concurring resolution to both the Secretary of the State and the Governor to formally consummate the
 25 process. Cal. Gov’t Code § 1321. According to a press release from the Office of the Governor that
 26 was released contemporaneously with his hire, Mr. Appelsmith’s position as senior advisor “does not

27 ¹ In addition to the advisory position, the Governor also appointed Mr. Appelsmith to head the
 28 Department of Alcoholic Beverage Control. WD, Exs. 15-16. However, this position is completely
 distinct, with unique responsibilities, pay, sovereign powers, and public accountability requirements.

1 require Senate confirmation” nor provide him with any additional compensation on top of his standard
 2 salary for serving as the Director of the Department of Alcoholic Beverage Control. WD, Ex. 16. This
 3 press release fills in the gaps of the Secretary of the State’s comprehensive roster of public officers,
 4 which makes no mention of any advisory position in the Office of the Governor as qualifying for public
 5 office status. California Secretary of State, California Roster 2011, [http://www.sos.ca.gov/admin/ca-](http://www.sos.ca.gov/admin/ca-roster/2011/pdf/00-2011-ca-roster.pdf)
 6 [roster/2011/pdf/00-2011-ca-roster.pdf](http://www.sos.ca.gov/admin/ca-roster/2011/pdf/00-2011-ca-roster.pdf) (last visited Aug. 13, 2011).

7 However, being a personal and unaccountable senior legal advisor to the Governor has not
 8 stopped Mr. Appelsmith from communicating with representatives from Pauma about the merits of the
 9 lawsuit. Coincidentally, each incident arose after Judge Burns stayed further discovery in this matter.
 10 *Pauma*, Docket No. 64 (S.D. Cal. Dec. 17, 2010) (order staying discovery until further notice). The first
 11 instance appears to have occurred this past January shortly after Mr. Appelsmith began advising the
 12 Governor on Indian gaming issues. WD, ¶ 5; Ex. 3. Even though this in-person meeting between Mr.
 13 Appelsmith and an unauthorized representative from the Tribal Council purportedly concerned the
 14 subject matter of the litigation, neither Mr. Appelsmith nor anyone with the Attorney General’s Office
 15 ever informed Pauma’s counsel that such a meeting took place. WD, ¶ 5. Eliminating any hope of this
 16 event being an isolated instance of *ex parte* contact, counsel of record for the Attorney General’s Office
 17 (“Ms. Laird”) informed Pauma’s counsel on the afternoon of August 4th that Mr. Appelsmith had
 18 scheduled a discreet settlement meeting with select anonymous representatives from the Tribal Council
 19 for August 18th.² WD, ¶¶ 2-3, 6; Ex. 4. While Pauma’s counsel was not included in the back-and-forth
 20 correspondence pertaining to the settlement meeting, Ms. Laird indicated that she saw the name of Rob
 21 Rosette, the Tribe’s long since terminated attorney of record and Mr. Appelsmith’s recent counterpart in
 22 the negotiations for the Upper Lake compact. WD, ¶ 2, AD, ¶ 6; LD, ¶ 4; Opp., 2:3-11 ; Exs. 13-14.
 23 Given the wording of the State’s response, and Ms. Laird’s refusal to divulge any information about the
 24 participants of the meeting, there is a strong likelihood that at least one Tribal Council member who was
 25 acting outside the scope of his authority was also involved in this exchange. AD, ¶ 7; WD, ¶ 2.

26 After receiving verification that the General Council had not approved a meeting of this nature,

27 ² Mr. Appelsmith confirmed the veracity of these comments in a letter sent directly and
 28 exclusively to the Tribal Council, which the Tribe’s administrative staff received on August 8th and
 forwarded to Pauma’s counsel on the morning of August 15th. WD, ¶ 6; Ex. 4.

1 Pauma's counsel contacted Ms. Laird the following morning to request that she forward the e-mail
 2 correspondence regarding the pending settlement conference. WD, ¶¶ 2-3; Ex. 1. This August 5th e-
 3 mail also reminded Ms. Laird that she and any other attorney acting on the State's behalf in connection
 4 with the ongoing compact dispute must first obtain the consent of Pauma's counsel before
 5 communicating with a representative of the Tribe about the lawsuit, even if the State did not initiate the
 6 contact. WD, ¶ 3; Ex. 1.

7 Failing to receive a response from any attorney with the State by the end of the business day on
 8 August 8th, Pauma's counsel e-mailed a letter to Ms. Laird and Mr. Appelsmith, jointly, to inform the
 9 latter of his ethical obligations under California Rule of Professional Responsibility 2-100 ("Rule 2-
 10 100"), and to prevent any further *ex parte* communications about the litigation with representatives from
 11 Pauma. WD, ¶¶ 4-5; Ex. 3. As well as serving as a courtesy reminder of this basic prohibition against
 12 contacting an adverse represented party, the August 8th letter also requests that the State disclose all
 13 evidence regarding its prior lawsuit-related contacts with representatives from Pauma either voluntarily
 14 or pursuant to the State's Public Records Act. WD, ¶ 5; Ex. 3; *see* Cal. Gov't Code § 6250 *et seq.* In
 15 closing, the August 8th letter emphasizes that "all future communications about the suit or settlement
 16 should take place amongst the attorneys of record, aside from those taking place between the Tribal
 17 Chairman and the Governor or a non-attorney member of his support staff." WD, Ex. 3.

18 In response, the following afternoon Ms. Laird sent an e-mail indicating that she was in receipt
 19 of both the August 5th e-mail and the August 8th letter addressed to her "client" in the Office of the
 20 Governor, which concerned a "party-to-party meeting between the Governor's Office and some or all of
 21 the Pauma Band of Mission Indians' Tribal Council currently scheduled for August 18, 2011." WD, ¶
 22 7; Ex. 5. This quoted language is considerably different from Ms. Laird's comment during the August
 23 4th phone call that the tentative settlement meeting was with Mr. Appelsmith, who is not a party to the
 24 litigation, rather than a policy-making official or any other subordinate non-attorney employee with the
 25 Office of the Governor. WD, ¶ 7; Ex. 5. Citing her pressing briefing commitments in connection with
 26 the Reply to the State's Motion to Dismiss, Ms. Laird said that she would "respond to both of [the]
 27 referenced communications as soon as possible but in no event later than the close of business on
 28 Thursday, August 11, 2011." WD, Ex. 5.

1 Once this deadline passed without word from the Attorney General's Office, Pauma's counsel
 2 called Ms. Laird to ascertain the State's position on these issues. WD, ¶ 8. In a nearly simultaneous e-
 3 mail response, Ms. Laird assured Pauma's counsel that a "written response to your two recent inquiries
 4 is currently being reviewed and finalized" and that she would deliver the response "via e-mail and U.S.
 5 Mail as soon as possible tomorrow." WD, ¶ 8; Ex. 6. Despite this assurance, Pauma's counsel still had
 6 not received the State's response by 3:00 PM of the following day. WD, ¶ 9. With the unauthorized
 7 settlement conference set to take place in four business days, Pauma's counsel sent one final e-mail to
 8 Ms. Laird, again inquiring whether the State intended to withhold the correspondence regarding the
 9 purported August 18th settlement conference and proceed with the pending meeting "despite receiving
 10 notice that it is not authorized by the Pauma tribal government." WD, ¶ 9; Ex. 7.

11 Shortly before 5:00 PM on Friday August 12th, Ms. Laird e-mailed a terse response wherein she
 12 backtracked from her prior statements. WD, ¶ 10; Ex. 8. Even through the State's formal reply had
 13 been in the works for the better part of a week, this time Ms. Laird indicated that she could not relay the
 14 document because "Mr. Appelsmith [was] away from the office" and she had been unable to reach him.
 15 WD, Ex. 8. Before ending her e-mail correspondence, Ms. Laird made sure to impress upon Pauma's
 16 counsel that she had no real duty to respond aside from the statutory one required for "proper" Public
 17 Records Act requests." WD, ¶ 10; Ex. 8.

18 Dealing with attorneys who appeared intent on proceeding with their plan to conduct imminent
 19 *ex parte* communications, while zealously guarding the evidence of prior instances, on August 15, 2011,
 20 Pauma moved the Court *ex parte* for a protective order pursuant to Rule 26(c). *Pauma*, Docket No. 118
 21 (S.D. Cal. Aug. 15, 2011). The requested protective order would have prevented any non-policy making
 22 attorney with the Attorney General's Office, the CGCC, and the Office of the Governor from
 23 communicating with representative of Pauma about the subject matter of the litigation without the
 24 advance consent of the Tribe's counsel of record; and required the State to promptly disclose all e-mails,
 25 notes, letters, memoranda, and other documents "constituting or referring to any such [prior *ex parte*]
 26 communication to or from any" Tribal member. *Resnick v. Am. Dental Ass'n*, 95 F.R.D. 372, 377 (N.D.
 27 Ill. 1982) ("*Resnick*") (providing for identical relief in another case of *ex parte* communications).
 28 Pauma's counsel viewed the protective order as necessary in order to block any improper future

1 settlement meetings, prevent future *ex parte* communications, and determine the extent of the existing
2 breach of the attorney client privilege.

3 Shortly before the filing of the *ex parte* motion, and well after the completion of the documents
4 comprising the filing, Ms. Laird finally provided Pauma's counsel with the State's long-awaited reply.
5 Therein, she indicated that Rule 2-100 does not prohibit an attorney employee for one of the parties from
6 communicating with the other party "without the involvement of the attorneys representing those
7 clients." LD, Ex. A. Moreover, even if Rule 2-100 forbids such a practice, Mr. Appelsmith's contact
8 would still be permissible because "the Rule contains an exception for '[c]ommunications with a public
9 officer, board, committee, or body[.]' " *Id.* Despite advancing this argument, the State nonetheless
10 indicated that the impending settlement meeting was "postpone[d]" in "light of conflicting information
11 originating from two law firms, each purporting to represent the Tribe" in the litigation. *Id.* The August
12 15th letter does not identify the alleged competing law firm or provide any assurance that Mr.
13 Appelsmith would refrain from trying to circumvent Pauma's counsel in the hopes of setting the lawsuit.

14 On the following afternoon of August 16, 2011, the Office of the Governor e-mailed a letter to
15 Pauma's counsel that Mr. Appelsmith had mailed directly to the Tribal Council the day before.³ WD2, ¶
16 2; Ex. A; AD, ¶ 10; Ex. A. Through the August 15th letter, Mr. Appelsmith informed the Tribal Council
17 that "[i]t is necessary to postpone our meeting in light of conflicting information originating from the
18 law firms of Williams and [sic] Cochran and Rosette and Associates, both of which purport to represent
19 Pauma." *Id.* Despite postponing the meeting, Mr. Appelsmith indicated his continued "willing[ness]"

20 ³ The recipients of the Office of the Governor's August 16th e-mail are Pauma's counsel and Rob
21 Rosette with the law firm of Rosette & Associates. WD2, ¶ 2; Ex. A. Curiously, Mr. Appelsmith's
22 declaration indicates that Mr. Rosette received the letter attached to the August 16th e-mail a day early,
23 on August 15th, at which point Mr. Rosette called Mr. Appelsmith to reiterate that he represents the
24 Pauma Tribal Council and that his client "intended no participation by the attorneys involved in the
25 litigation" at the settlement meeting. AD, ¶¶ 10-11. Pauma's counsel is perplexed as to why Mr.
26 Appelsmith, who has personally negotiated two tribal/State compacts, would work with an attorney that
27 he knows no longer represents the Tribe in the litigation to stage a covert settlement meeting with un-
28 customary tribal representatives without the knowledge or consent of the Tribe's longstanding attorneys
of record. By simply calling Pauma's counsel, Mr. Appelsmith would have discovered that: (1) our firm
represents Pauma in the litigation, and has throughout his entire tenure as senior advisor to the
Governor; (2) like every other tribe in the State, Pauma does not have separate counsel for its Tribal
Council; and (3) even if it did, Chairman Majel is unaware of Mr. Rosette serving in such a capacity.
MD, ¶¶ 2-3. But the more fundamental question is, if Mr. Appelsmith honestly views himself as a party
to the litigation, why was he dealing with *any* attorneys instead of directly contacting Chairman Majel
about settling the matter at a properly-structured and attended settlement conference?

1 and availabl[ility] to meet with Pauma's Tribal Council in my position as the Governor's advisor on
 2 tribal matters, not as legal counsel to any party, to confidentially discuss possible settlement of the
 3 federal action[.]” *Id.* This August 15th letter is the last communication Pauma's counsel has received
 4 from the State regarding the propriety of Mr. Appelsmith's view that he can communicate with Pauma
 5 representatives about the present suit without the prior approval of the Tribe's counsel of record.

6 With respect to the *ex parte* motion, the State did not file an opposition by 5:00 PM of the
 7 business day following service of process, the cut-off ordinarily imposed by Judge Battaglia's chamber
 8 rules. Upon referral of the *ex parte* motion, Judge Dembin ordered the State to respond by the close of
 9 business on August 22, 2011. *Pauma*, Docket No. 122 (S.D. Cal. Aug. 17, 2011). Although it did, the
 10 State's response is replete with contradictions. On one hand, the State claims that Mr. Appelsmith is the
 11 Governor's senior advisor for Indian affairs and “provides no legal advice and renders no legal services
 12 in this capacity.” *Opp.*, 1:23-24. On the other hand, the State conversely explains that Mr. Appelsmith
 13 occupies a traditional legal position, negotiates all new or amended Tribal-State gaming compacts (i.e.
 14 drafts the terms of these legally binding contracts, like the one that is at issue in the present case), and
 15 even “undertakes to review proposed pleadings” in the present action. *Opp.*, 1:25-27; 9:2-5; LD, ¶ 3.
 16 As to this last point, Ms. Laird further admits that Mr. Appelsmith even conducts the final review of
 17 legal correspondence the Attorney General's Office sends to Pauma's counsel. LD, ¶ 11. As a second
 18 example of the doublespeak in the State's response, Mr. Appelsmith, who claims immunity from
 19 unauthorized attorney contact based upon his status as a party to the litigation, freely communicates with
 20 other attorneys purporting to represent Pauma in this matter even though he knows they no longer serve
 21 in that capacity. AD, ¶¶ 6, 11-12; LD, ¶ 4; *Opp.*, 2:3-11 In addition to advancing these irreconcilable
 22 statements, the State's response also does not refute the allegation that Mr. Appelsmith has previously
 23 communicated with representatives of Pauma about the lawsuit without the knowledge of the Tribe's
 24 counsel of record. In order to avoid the subject, Ms. Laird repeatedly argues that the only attorneys for
 25 the State who are subject to Rule 2-100 are the Attorney General and the “designated attorneys
 26 employed in that office” whose names appear on the pleadings. *Opp.*, 8:14-18; 9:13-24; 10:1-3.

27 Rather than address the question of whether Mr. Appelsmith's conduct violated Rule 2-100, the
 28 State instead asked the Court to deny the *ex parte* motion for largely procedural reasons, including its

1 contention that the Federal Rules of Civil Procedure does not authorize the issuance of a protective order
 2 in the absence of a discovery request. Opp., 4:8-9; 5:19-20; 8:5-6. On August 23, 2011, Judge Dembin
 3 agreed with the State's argument, denying the *ex parte* motion in full because "there [wa]s no discovery
 4 dispute before the Court" that would authorize a protective order. *Pauma*, Docket No. 118 (S.D. Cal.
 5 Aug. 23, 2011).

6 In support of its decision, the order cites "*U.S. v. Sierra Pac. Indians*, 759 F.Supp.2d 1215, 1217
 7 (E.D. Cal. 2011)"⁴ for the proposition that a federal court may issue a protective order to prevent *ex*
 8 *parte* communications only when the other party is "engaging in the challenged activity for the purposes
 9 of gathering discovery." Other district courts to address identical requests have disregarded the Rule
 10 26(c) designation and proceeded to entertain the motion as a request for a protective order generally.
 11 See *Hammond*, 167 F.Supp.2d at 1275 ("The Court nevertheless has the power to issue an order to direct
 12 the conduct of counsel and to require counsel's adherence to applicable disciplinary and ethical rules...
 13 The court will therefore consider the motion."); *Turnball*, 185 F.R.D. at 651 ("Independent of the rule,
 14 the court may issue a protective order, if necessary to direct the conduct of a party or counsel. The court
 15 has inherent power to require adherence by counsel to applicable disciplinary rules... These include the
 16 Model Rules of Professional Conduct[.]"). This keeps with the district court's affirmative duty to
 17 examine any allegation of unprofessional conduct raised by one of the parties. *Gas-a-Tron of Az.*, 534
 18 F.2d at 1324 ("We agree... 'whenever an allegation is made that an attorney has violated his moral and
 19 ethical responsibility, an important question of professional ethics is raised. It is the duty of the district
 20 court to examine the charge, since it is that court which is authorized to supervise the conduct of the
 21 members of its bar.' " (quoting *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382 (3d Cir. 1972)).

22 Since *Pauma*'s original *ex parte* motion was denied on a purely technical ground, *Pauma* now
 23 moves the Court for alternate relief, specifically requesting that the Court (1) address the applicability of
 24 Rule 2-100 to Mr. Appelsmith; (2) issue a protective order preventing any non-policy making attorney

25 ⁴ The order misstates the case name as *United States v. Sierra Pacific Indians* instead of *United*
 26 *States v. Sierra Pacific Industries*. While *Sierra Pacific* deals with the issuance of a Rule 26(c)
 27 protective order to prevent *ex parte* communications, the opinion does not confine a district court's
 28 authority to grant the requested relief to situations involving discovery disputes. In fact, as is explained
 in the Legal Standard section, *infra*, a district court should overlook the Rule 26(c) designation and
 consider issuing a protective order whenever the relevant motion raises an allegation that an attorney has
 breached his ethical duties.

1 with the Attorney General's Office, the CGCC, or the Office of the Governor from communicating with
 2 any representative of Pauma about the subject matter of the litigation without the presence or prior
 3 approval of the Tribe's counsel of record; and (3) require the State to promptly disclose all evidence of
 4 Mr. Appelsmith's prior lawsuit-related *ex parte* contacts with representatives of the Tribe in order to
 5 rectify the apparent breach of the attorney-client privilege.

6 **LEGAL STANDARD**

7 A court may issue a protective order to prohibit an attorney from engaging in *ex parte*
 8 communications about the subject matter of a lawsuit with an adverse represented party. *See, e.g., U.S.*
 9 *ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998) ("*McDonnell Douglas*");
 10 *Hammond*, 167 F.Supp.2d at 1275; *Turnball*, 185 F.R.D. at 651. A court should consider providing this
 11 remedy, as well as addressing any underlying allegations regarding ethical violations, even if the party
 12 mistakenly moves under Rule 26(c). *Hammond*, 167 F.Supp.2d at 1275; *Turnball*, 185 F.R.D. at 651.
 13 The reason for this is that district courts have an affirmative duty to examine any allegation of
 14 unprofessional conduct, and to take the necessary corrective and disciplinary actions. *Gas-a-Tron of*
 15 *Az.*, 534 F.2d at 1324; *see Erickson v. Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996) ("The district
 16 court has the duty and responsibility of supervising the conduct of attorneys who appear before it.");
 17 *Trust Corp. of Mont. v. Piper Aircraft Corp.*, 701 F.2d 85, 87 (9th Cir. 1983); *Empire Linotype School v.*
 18 *U.S.*, 143 F.Supp. 627, 631 (S.D.N.Y. 1956) ("[I]t is the responsibility of the Court to ascertain whether
 19 there is any merit to the accusation when once an alleged violation of the Canons has been called to the
 20 Court's attention."); 7 C.J.S. Attorney & Client § 42 (2011) ("The ethical rules encompassed in such
 21 codes are highly persuasive and due the utmost consideration, and the courts should not denigrate such
 22 provisions by indifference.").

23 **OBJECTIONS TO ORDER ON EX PARTE MOTION [FED. R. CIV. P. 72(A)]**

24 **I. SUMMARY OF OBJECTIONS TO AUGUST 23, 2011 ORDER DENYING EX PARTE MOTION**

25 **Objection No. 1 (contrary to law):** The Order fails to address the merits of the Motion or even
 26 analyze the facts regarding the improper communications Pauma seeks to prevent, in contravention of
 27 the Ninth Circuit's mandate that district courts examine any charge that an attorney violated his ethical
 28 duties. *Gas-a-Tron of Az.*, 534 F.2d at 1324-25.

Objection No. 2 (contrary to law): The Order denies the Motion on the non-substantive basis that it fails to present a discovery dispute pursuant to Rule 26(c), a technicality that courts often overlook in order to fulfill their affirmative duty to require counsel to adhere to applicable ethical rules. *Hammond*, 167 F. Supp. 2d at 1275; *Turnball*, 185 F.R.D. at 651. Thus, the Court had both the power and the duty as set forth in *Gas-a-Tron* to look past the discovery label and examine the merits of the ethics allegations in the Motion and the movant's need for protective relief.

Objection No. 3 (clearly erroneous and contrary to law): To the extent there are findings of fact, the Order wholly adopts Defendants' assertion that Mr. Appelsmith is not acting as an attorney in his position with the Office of the Governor without examining the nature of the work he actually performs. This conclusion is both contrary to the authority cited in the Motion and clearly erroneous in light of information submitted by the parties.

II. EXPLANATION OF OBJECTIONS

A. OBJECTION NO. 1: THE ORDER IS CONTRARY TO NINTH CIRCUIT PRECEDENT REQUIRING COURTS TO EXAMINE ALLEGATIONS OF UNETHICAL CONDUCT.

The Order provides little analysis, choosing instead to summarily deny the Motion on the basis that Pauma did not allege a discovery dispute pursuant to Rule 26(c). As a result, the Order ignores the fifteen pages of allegations that Mr. Appelsmith violated Rule 2-100, which provides that "[w]hile representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." In fact, the Order disposes of this concern through a one-sentence summation of the unsupported argument in the Defendants' Response: "Defendants admit that the representative of the Governor is an attorney but that he is not acting as such – he is the party representative of the Governor's office in this litigation and also serves as the representative of the Governor's Office in Tribal matters." This wholesale adoption of Defendants' conclusory allegations falls far short of the Ninth Circuit's mandate that district courts "examine" any charge of unethical conduct. *Gas-a-Tron of Az.*, 534 F. 2d at 1324-25 ("Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised, and it is the duty of the district court to examine the charge, since it is that court which is authorized to

1 supervise the conduct of the members of the bar.” (citation omitted)); *see also Erickson*, 87 F.3d at 303
 2 (indicating the district court’s failure to comply with *Gas-A-Tron* caused unfair prejudice to the
 3 complaining party and required a new trial).

4 Gauging whether a party has violated Rule 2-100 requires a review of the authority defining the
 5 contours of Rule 2-100 and the application of the proffered facts to those standards. Here, this process
 6 would necessarily entail examining whether Mr. Appelsmith is a party to the suit, as Defendants
 7 contend, or an in house legal advisor for the Office of the Governor who is actively participating in the
 8 litigation, as Pauma counters. If the latter is the case, then the Court would need to also determine
 9 whether Mr. Appelsmith qualifies for the “public officer” exception to Rule 2-100. While the State did
 10 not address any of this in its Response, these topics were all analyzed at length in the original fifteen-
 11 page Motion. Only a detailed review of these issues can satisfy the Ninth Circuit’s mandate in *Gas-a-*
 12 *Tron* that district courts carefully examine any allegation of unethical conduct. Accordingly, the Order’s
 13 failure to do so is contrary to law, and grounds for the District Court to require the Court to address the
 14 allegations in the Motion in light of the previously-submitted argument. *See Trone v. Smith*, 621 F.2d
 15 994, 999 (9th Cir. 1980) (overturning the denial of motion to disqualify where district court failed to
 16 review the scope of attorney’s work in prior and present representation).

17 **B. OBJECTION NO. 2: THE ORDER IS CONTRARY TO LAW REQUIRING COURTS TO LOOK**
 18 **PAST TECHNICAL DEFECTS IN ORDER TO ADDRESS ALLEGATIONS OF ETHICAL**
 19 **MISCONDUCT.**

20 The Order denies the Motion on the non-substantive basis that it fails to present a discovery
 21 dispute pursuant to Rule 26(c). When handling identical requests, other district courts have disregarded
 22 the Rule 26(c) label and proceeded to entertain the motion, *see Hammond*, 167 F.Supp.2d at 1275
 23 (considering a Rule 26(c) motion for a protective order to prevent *ex parte* communications in order to
 24 ensure compliance with applicable disciplinary and ethical rules); *Turnball*, 185 F.R.D. at 651; in order
 25 to satisfy their affirmative duty to investigate and address any allegation of unethical conduct by one of
 26 the parties. *Gas-a-Tron*, 534 F.2d at 1324-25. Thus, the Court had both the power and the duty to
 27 overlook the discovery label and examine the merits of the allegations in the Motion. Given the Court’s
 28 failure to do this, the District Court should find the Order contrary to law and require the Court to

1 address the Motion in light of the previously-submitted argument.

2 **C. OBJECTION NO. 3: THE ORDER’S WHOLESALE ADOPTION OF THE STATE’S ARGUMENT**
 3 **THAT JACOB APPELSMITH IS NOT PARTICIPATING AS AN ATTORNEY IN THIS MATTER IS**
 4 **BOTH CLEARLY ERRONEOUS AND CONTRARY TO LAW.**

5 Assuming the Order makes a finding of fact regarding Mr. Appelsmith’s role with the Office of
 6 the Governor, which is entirely unclear given the sparse nature of the eight sentence Order, it wholly
 7 adopts Defendants’ assertion that Mr. Appelsmith is acting as a non-attorney political go-between by
 8 stating: “Defendants admit that the representative of the Governor is an attorney but that he is not acting
 9 as such – he is the party representative of the Governor’s office in this litigation and also serves as the
 10 representative of the Governor’s Office in Tribal matters.”

11 Where there is a wholesale adoption of one party’s findings or arguments, as may be the case in
 12 the Order, the district court must carefully and thoroughly scrutinize the magistrate judge’s findings and
 13 the evidence in the record. *Holland v. Island Creek Corp.*, 885 F.Supp. 4, 6 (D.D.C. 1995) (indicating
 14 “it is incumbent on the Court to check the adopted findings against the record ‘with particular, even
 15 painstaking care’ if the magistrate judge does not offer a reasoned explanation for his decision); *cf.*
 16 *Silver v. Executive Car Leasing Disability Plan*, 466 F.3d 727, 733 (9th Cir. 2006) (requiring a careful
 17 inspection of the record when district court wholly adopts prevailing party’s findings). Here, a careful
 18 review of the record reveals that any finding that Mr. Appelsmith is not participating as an attorney in
 19 this case is clearly erroneous in light of the evidence, and contrary to the law concerning Rule 2-100.

20 The Defendants describe the work performed by Mr. Appelsmith on behalf of the Governor in
 21 connection with this suit as follows: (1) reviewing the pleadings before their filing, and providing final
 22 review of the Attorney General Office’s legal correspondence to Pauma’s counsel prior to its
 23 transmission (Declaration of T. Michelle Laird, Docket No. 123-3 (“Laird Dec.”), ¶ 3); (2) negotiating
 24 and drafting the terms of new and amended tribal-State compacts, like the one in this lawsuit
 25 (Appelsmith Dec., ¶ 3); (3) and attempting to settle the instant action via negotiation of a new compact
 26 (Appelsmith Dec., ¶¶ 6-8).⁵ The authority cited within the Motion undeniably proves that these acts are

27 ⁵ Notably, Ms. Laird explains that the person who performed these duties for Governor
 28 Schwarzenegger was “Secretary of Legal Affairs” Andrea Hoch, who unquestionably acted as an
 attorney on behalf of the Governor during the eight months worth of pre-suit negotiations in the present
 matter. Laird Dec., ¶ 3. The fact that Governor Brown chose a different label for Mr. Appelsmith does

1 *per se* legal in nature and thus trigger the application of the California Rules of Professional Conduct.
 2 *See* Formal Opinion No. 1988-103 of the State Bar of Cal. (citing *Smallberg v. State Bar*, 212 Cal. 113
 3 (1931) (the practice of law includes “the perform[ance] of services in any matter pending in a court...
 4 throughout the various stages,” including “the rendering of legal advice and counsel in the preparation of
 5 legal instruments and contracts by which legal rights are secured.”)); *Libarian v. State Bar*, 21 Cal.2d
 6 862 (1943) (“He should appreciate that when he is licensed to practice as an attorney at law, the
 7 professional services that he thus performs are performed by him as an attorney, whether or not some of
 8 the services could also be rendered by one licensed in a different profession. One who is licensed to
 9 practice as an attorney in this state must conform to the professional standards in whatever capacity he
 10 may be acting in a particular matter.”). Considering this, the attempted settlement of an existing lawsuit
 11 is not only considered the performance of legal work but a violation of the ethical rules when the
 12 responsible attorney interacts with a represented client to accomplish this end without the consent of his
 13 or her counsel of record. *See Abeles v. State Bar*, 9 Cal.3d 603 (1973) (holding that it was improper for
 14 an attorney to engage in a settlement conference with the opposing party behind the back of their
 15 counsel); *Turner v. State Bar*, 36 Cal.2d 155 (1950) (indicating an attorney was not working in a
 16 ministerial capacity when he drew up settlement papers for an represented adverse party); *see also*
 17 Ethics Opinion 1968-2 of the San Diego County Bar Ass’n (“[I]t was a breach of legal ethics for counsel
 18 for defendant to attend a meeting for the purpose of settling the dispute without first notifying and
 19 obtaining the consent of counsel for the Plaintiff.”). Thus, a careful review of the record shows that the
 20 Court’s potential finding that Mr. Appelsmith is not acting as an attorney is both clearly erroneous in
 21 light of the submitted evidence and contrary to law regarding the existence of an attorney-client
 22 relationship and the application of Rule 2-100.

23 ARGUMENT

24 **I. AS THE STATE’S PRINCIPAL NEGOTIATOR OF TRIBAL/STATE GAMING COMPACTS LIKE THE**
 25 **ONE HEREIN INVOLVED, JACOB APPELSMITH VIOLATED RULE 2-100 BY ENGAGING IN EX**
 26 **PARTE COMMUNICATIONS WITH REPRESENTATIVES FROM PAUMA FOR THE PURPOSE OF**
 27 **ATTEMPTING TO SETTLE THE CASE WITHOUT THE KNOWLEDGE OF THE TRIBE’S COUNSEL OF**
 28 **RECORD.**

not change the inescapable fact that he performs legal work on behalf of the Office of the Governor with respect to this litigation.

1 Rule 2-100 is a ‘no contact’ rule which states that “[w]hile representing a client, a member shall
 2 not communicate directly or indirectly about the subject of the representation with a party the member
 3 knows to be represented by another lawyer in the matter, unless the member has the consent of the other
 4 lawyer.”⁶ *U.S. v. Sierra Pac. Indus.*, 759 F.Supp.2d 1215, 1216 (E.D. Cal. 2011) (“*Sierra Pacific*”)
 5 (quoting Rule 2-100). “[The no contact rule] shields the opposing party not only from an attorney’s
 6 approaches which are intentionally improper, but, in addition, from approaches which are well
 7 intentioned but misguided.” *Mitton v. State Bar*, 71 Cal.2d 524, 534 (1969). The courts employ a bright
 8 line rule that looks past the motives of the implicated attorney because “the rule exists in order to
 9 preserve[e]... the attorney-client relationship and the proper functioning of the administration of
 10 justice.” *U.S. v. Talao*, 222 F.3d 1133, 1138 (9th Cir. 2000) (“*Talao*”) (internal quotations omitted).

11 **A. JACOB APPELSMITH REPRESENTS THE OFFICE OF THE GOVERNOR IN ALL GAMING**
 12 **COMPACT MATTERS.**

13 After reviewing the State’s response to the *ex parte* motion, the crux of Ms. Laird’s position is
 14 that Mr. Appelsmith is not representing the Office of the Governor in connection with the tribal/State
 15 gaming compact issues herein involved. The ethics laws of this or any state would have little effect if
 16 they were unable to reach beyond the docket and apply to all the other attorneys who are silently
 17 working behind the scenes on a particular lawsuit.⁷ The ABA recognized as much when it drafted its
 18 version of the ‘no contact’ rule to protect “against possible overreaching by other lawyers who are
 19 participating in the matter.” Model Rules of Prof’l Conduct R. 4.2 cmt. 1 (1983) (emphasis added).

20 ⁶ Similar versions of this rule are in effect in all fifty states and within the jurisdiction of the
 21 American Bar Association (“ABA”). *In re Dale*, 2005 WL 1389226, *5 n.6 (Cal.Bar Ct. 2005). The
 22 primary textual difference among the various renditions of the rule pertains to its scope, and whether it
 23 protects only represented “parties” or other “persons” involved in a proceeding like witnesses. *Id.* Since
 24 this issue is largely immaterial to the present motion, Pauma will cite to the rules, comments, and ethics
 25 opinions from the ABA and other comparable jurisdictions when necessary to provide additional support
 26 for its arguments. This approach seems consistent with the Civil Local Rules, which indicate the
 27 California Rules of Professional Conduct are not the sole resource for adjudging compliance with
 28 prevailing ethical standards, and that, at a minimum, a district judge may consider the analogous rules
 under the ABA. Civ.LR 83.4(b).

⁷ This is certainly a concern in this case since Ms. Laird contends that the only attorneys subject to
 Rule 2-100 are the Attorney General and the two other “attorneys employed in that office” who are
 designated on the caption of the State’s pleadings. Opp., 8:14-16. Accepting Ms. Laird’s argument
 would mean that any one of the hundreds of non-captioned attorneys working for the Attorney General’s
 Office, the CGCC, or the Office of the Governor could correspond with representatives from Pauma
 about the subject matter of the litigation without the advance consent of our firm. Needless to say,
 Pauma’s counsel roundly objects to the State’s interpretation of Rule 2-100.

1 Thus, the central question is whether Mr. Appelsmith has an attorney-client relationship with the
 2 Governor in connection with the Indian gaming issues that are at the heart of the present action. *See*,
 3 e.g., Formal Opinion No. 1993-132 of the State Bar of Cal.; Advisory Opinion No. 1984 of the Wash.
 4 State Bar Ass’n (1997) (“The prohibition of RPC 4.2 thus depends on the existence of an attorney-client
 5 relationship and a communication in the context of the representation.”); Advisory Opinion No. 1738 of
 6 the Wash. State Bar Ass’n (1997) (“Whether RPC 4.2 applies depends on whether the licensed attorney
 7 is providing legal representation or advice.”).

8 In California, an attorney-client relationship arises from either an express or implied contract.
 9 *Responsible Citizens v. Superior Court*, 16 Cal.App.4th 1717 (5th Dist. 1993) (stating that the existence
 10 and nature of an implied attorney-client relationship is determined by the totality of the circumstances,
 11 including the parties conduct). When a party seeking legal advice consults an attorney at law and
 12 secures that advice, the relation of attorney and client is established *prima facie*. *Perkins v. W. Coast*
 13 *Lumber Co.*, 129 Cal. 427, 429 (1900); *see* Formal Opinion No. 1993-132 of the State Bar of Cal.
 14 (“Courts are especially prone to find that an attorney-client relationship has arisen when a putative client
 15 reveals information in confidence to one he knows to be an attorney.” (citing, e.g., *Miller v. Metzinger*,
 16 91 Cal.App.3d 31 (2d Dist. 1979); *Ferrara v. La Sala*, 186 Cal.App.2d 263 (2d Dist. 1986);
 17 *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978))). By naming Mr.
 18 Appelsmith his senior advisor for Indian gaming, there is no doubt that Governor Brown sought to have
 19 someone in house who could offer candid and independent advice on compacting issues, taking into
 20 account not only the law but other considerations such as “moral, economic, social and political factors,
 21 that may be relevant to the [the State’s] situation.” Model Rules of Prof’l Conduct R. 2.1 (1983). After
 22 all, the Office of the Governor had a pressing need for an attorney to act in this position given the recent
 23 rash of federal court decisions that altered the State’s existing contractual obligations with its sixty-plus
 24 gaming tribes, and its legal obligations to any tribe that approaches the negotiating table with the hopes
 25 of securing a new or amended compact. *See*, e.g., *Cachil Dehe Band of Wintun Indians of Colusa*
 26 *Indian Cmty. v. State of Cal.*, 618 F.3d 1066 (9th Cir. 2010) (providing an additional 8,050 gaming
 27 device licenses to tribes with 1999 compacts); *Rincon Band of Luiseno Mission Indians of the Rincon*
 28 *Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010) (imposing significant constraints on, if

not altogether baring, the State's receipt of general fund revenue sharing under tribal/State compacts). With remarkable verve, Mr. Appelsmith has taken the reins of his advisory position and negotiated the terms of new gaming compacts with Upper Lake and Pinoleville, as well as represented the Governor in the court-ordered mediations in the Rincon and Big Lagoon "bad faith" lawsuits. WD, ¶ 12; Exs. 16-17 ("Brown's negotiator, Jacob Appelsmith, called the [Upper Lake] compact 'a model for how the state and local communities and tribes can all work together toward achieving something positive for each of their interests.' "). More than being just a participating attorney, Mr. Appelsmith is in fact *the* attorney for the State in all of its Indian gaming issues.

This perception gains support from Mr. Appelsmith's admissions within his signed declaration. Despite certifying that he provides neither legal advice nor legal services in his capacity as senior advisor to the Governor on Indian affairs, *see* AD, ¶¶ 3-4; Mr. Appelsmith goes on to admit that he has responsibility for negotiating the terms of each and every binding gaming contract between the State and its hundred plus Indian tribes. AD, ¶ 3. At no point does Mr. Appelsmith indicate that he serves as a middleman, simply conveying the Office of the Governor's negotiation demands to an attorney from the Attorney General's Office who then hammers out the financial and regulatory terms of the agreements. Rather, Mr. Appelsmith's declaration indicates that he performs this task himself, which aligns with the traditional function of his position, the information in prior newspaper articles, and the representations of the attorneys for the Rincon Band and the Big Lagoon Rancheria. WD, ¶¶ 12, 16-17, Exs. 13-14; LD, ¶ 3.

The notion that Mr. Appelsmith may have shed his legal responsibilities and approached this case from a purely political perspective is a fallacy. The courts of this State have no shortage of opinions indicating that the practice of law includes "the perform[ance] of services in any matter pending in a court... throughout the various stages," including "the rendering of legal advice and counsel in the preparation of legal instruments and contracts by which legal rights are secured." Formal Opinion No. 1988-103 of the State Bar of Cal. (citing *Smallberg*, 212 Cal. at 113). Irrespective of the full extent of his indeterminate involvement in this matter, the moment Mr. Appelsmith offered to speak for the Governor in settlement negotiations is when he unequivocally started acting as an attorney for the State and came into conflict with volumes of State common law and ethics opinions from around the

country saying *ex parte* communications about settlement with represented parties are impermissible. *Abeles*, 9 Cal.3d at 603 (holding that it was improper for an attorney to engage in a settlement conference with the opposing party behind the back of their counsel); *Turner*, 36 Cal.2d at 155 (indicating an attorney was not working in a ministerial capacity when he drew up settlement papers for an represented adverse party); see Ethics Opinion 1968-2 of the San Diego County Bar Ass’n (Dec. 3, 1968) (“[I]t was a breach of legal ethics for counsel for defendant to attend a meeting for the purpose of settling the dispute without first notifying and obtaining the consent of counsel for the Plaintiff.”); Formal Opinion No. 2005-6 of the Or. State Bar (Aug. 2005) (indicating an attorney may not negotiate with a represented party without the consent of opposing counsel); Formal Opinion No. 22 of the Idaho State Bar (“A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel.”); Informal Ethics Opinion No. RI-145 of the State Bar of Mich. (Oct. 1, 1992) (“There can be little doubt that [*ex parte* settlement communication] transgresses MRPC 4.2.”); Opinion No. 768 of the N.Y. State Bar Ass’n (Oct. 8, 2003) (stating a government lawyer may not “transmit information – whether it be the government’s legal position or negotiation of contractual points – to a person the lawyer knows to be represented by counsel”); Opinion 17 of the State Bar of Texas, 18 Baylor L. Rev. 200 (Dec. 1948) (prohibiting counsel from “communicating with a party represented by an attorney for any purpose,” including that which is “design[ed] to negotiate a compromise”).

Moreover, the most recent settlement communication, with its citation to the evidentiary rules under federal and state law, is not the only legal act Mr. Appelsmith has performed in this case. As the State’s response explains, Mr. Appelsmith has “often undertake[n] to review” Ms. Laird’s substantive pleadings before their ultimate filing, see *Opp.*, 9:2-5; and has even conducted the “final review” of legal correspondence from the Attorney General’s Office to Pauma’s counsel. LD, ¶ 11. While the State may advance this point to try and paint Mr. Appelsmith as an interested client, it conversely makes him look like the lead attorney on the litigation, and the person who has to provide the stamp of approval before the State disseminates any new legal arguments. This belief certainly gains credence from Mr. Appelsmith’s status as the State’s go-to attorney on gaming compact issues. AD, ¶ 3; *Opp.*, 1:25-27.

1 But identifying the precise moment when Mr. Appelsmith performed his first legal act in this
 2 matter is unnecessary because attorneys throughout the State are subject to the rules of professional
 3 conduct even if they are providing services in a different capacity, such as acting as a surrogate for the
 4 Governor. *Libarian*, 21 Cal.2d at 862 (“He should appreciate that when he is licensed to practice as an
 5 attorney at law, the professional services that he thus performs are performed by him as an attorney,
 6 whether or not some of the services could also be rendered by one licensed in a different profession. One
 7 who is licensed to practice as an attorney in this state must conform to the professional standards in
 8 whatever capacity he may be acting in a particular matter.”); *see* Formal Opinion No. 1993-132 of the
 9 State Bar of Cal.; Informal Ethics Opinion No. RI-166 of the State Bar of Mich. (June 3, 1993)
 10 (“Lawyers are subject to the Michigan Rules of Professional Conduct (MRPC) at all times, whether
 11 functioning in a legal or nonlegal capacity.”). Thus, the breach of the rules of professional conduct
 12 arose with the first *ex parte* communication pertaining to the lawsuit, which seems to have occurred this
 13 past January. WD, ¶ 5; Ex. 3. At that point, even if he wasn’t “representing” the Office of the Governor
 14 in the present matter in the truest and most technical sense of the word, Mr. Appelsmith should have
 15 been aware of the overarching prohibition preventing attorneys for the State from speaking with
 16 representatives from Pauma about the litigation without the advance consent of the Tribe’s counsel of
 17 record. This rule is inflexible, and Mr. Appelsmith cannot circumvent it by simply deciding that he
 18 would rather conduct *ex parte* communications through the Tribe’s former counsel of record with whom
 19 he has a preexisting relationship.

20 While the State may argue that requiring Mr. Appelsmith to comply with the rules of
 21 professional conduct would impede the ability of the Office of the Governor to disseminate policy
 22 advice on Indian gaming issues, this problem is self-inflicted and results from concentrating potentially
 23 incompatible job responsibilities within a single position. *Cf.* e.g., Formal Opinion No. 1993-132 of the
 24 State Bar of Cal. (“By choosing to simultaneously represent Client and to serve as a director of
 25 Corporation, the attorney runs significant risks of violating ethical rules”). But such an overblown claim
 26 of prejudice misses the fact that the Governor and his non-attorney employees still have a direct line of
 27 communication with Pauma, and Mr. Appelsmith can continue to communicate with “represented
 28 person[s]... concerning matters outside the representation.” Model Rules of Prof’l Conduct R. 4.2 cmt.

4. Moreover, this slight and albeit necessary restriction on speech is not unworkable. Should he need to relay a message from the Capitol that arguably relates to the compact litigation, Mr. Appelsmith can contact Pauma's counsel of record to either transmit the message or ask for permission to deliver it directly to an appropriate representative from Pauma. Aside from establishing an open dialogue with Pauma's counsel, Mr. Appelsmith can also request instructions from the Court as to whether his intended communication would comply with Rule 2-100. Model Rules of Prof'l Conduct R. 4.2 cmt. 6. Looking at the present situation in retrospect, following either one of these route would have ensured the sanctity of all privileged information, and removed the exigency of alerting the Court to multiple apparent violations of the ethical rules.

B. EACH TRIBAL COUNCIL MEMBER QUALIFIES AS A PARTY TO THE LAWSUIT.

The protections afforded by Rule 2-100 apply not only to the represented entity, but also to any person that has a position of managerial authority within it. According to Rule 2-100(B)(1), the term represented party includes "[a]n officer, director, or managing agent of a corporation or association." Before this rule became operative in 1989, the State courts released a series of opinions concerning an attorney's yet-to-be-addressed ethical responsibilities when dealing with a represented entity. In the first of these cases, the court made it clear that opposing counsel cannot contact a director of a represented corporation because the fiduciary has a seat on the board and is potentially exposed to privileged litigation information. *Mills Land & Water Co. v. Golden W. Refining Co.*, 186 Cal.App.3d 116, 127-28 (4th Dist. 1986). In addition to the dangers posed to the director personally, the *ex parte* communication would undercut the corporation's ability to secure the advice of counsel before providing the opposing party with the opportunity to access the information; impair corporate counsel's ability to control the litigation; and sully the court's responsibilities by requiring it to make numerous difficult, fact-intensive determinations as to whether the proffered statements occurred within the course and scope of employment and can thus be fairly imputed to the corporate entity. *Id.* at 127-129. Two years later, the same appellate court extended the holding in *Mills Land* to any "managerial employee" who has an "active, ongoing relationship with the corporate entity and might sustain prejudice as a consequence of the contact or make statements on the corporate employer." *Hewlett Packard Co. v. Superior Court*, 252 Cal.Rptr. 14, *17 (4th Dist. 1988); see Formal Opinion No. 2005-80 of the Or. State Bar (Aug. 2005)

1 (“If Current Employee is part of corporate management or a corporate officer or director, then Current
2 Employee is ‘represented’ within the meaning of this rule even though Current Employee is not
3 individually represented by Defense Lawyer.”).

4 This prohibition against *ex parte* communications applies even if a dissident director with his
5 own personal representation initiates contact with opposing counsel regarding an ongoing civil suit in
6 which the corporation is the adverse party. Formal Opinion No. 1991-125 of the State Bar of Cal. (“The
7 Committee is aware that the rule prohibits *ex parte* contact with the dissident director regardless of
8 whether or not he is named as a party in the action by the individual client against the corporation.”).
9 While the presence of personal counsel may insulate the dissident director from the “feared intrusive
10 acts” of the opposing attorney, it does nothing for the absent entity since the substitute attorney would
11 likely “take no action to protect the corporation which is adverse to his dissident director client.” *Id.*
12 With the release of Opinion No. 1991-125, the State ethics laws have covered the gamut of potential *ex*
13 *parte* communications in the represented entity context, and shown that each and every one of them is
14 impermissible without the prior consent of the association’s counsel of record for a particular matter.

15 As indicated in the Statement of Facts, *supra*, Pauma has four Tribal Council members and two
16 hundred and twenty-four other members who play an active role in directing the business, legal, and
17 political affairs of the Tribe. WD, Exs. 10-12. From what Pauma’s counsel can surmise, Mr.
18 Appelsmith has directly communicated with multiple members of the Tribe about the merits of the case
19 and the potential for settlement. WD, ¶¶ 5-6; Exs. 3-4. This includes members of the Tribal Council,
20 who routinely receive privileged information about the litigation and are presumably capable of making
21 statements that a court would impute against the Tribe as a whole. WD, ¶¶ 5-6; Ex. 3-4. Given this, at a
22 minimum the appropriate Tribal parties to this litigation for purposes of Rule 2-100 are the four Tribal
23 Council members, if not the entire General Council.

24 Should the Court determine otherwise, then Pauma’s counsel would face serious difficulty in
25 controlling the litigation. As Ms. Laird suggests, *see Opp.*, 8:14-16; any non-captioned attorney for the
26 Attorney General’s Office, the CGCC, or the Office of the Governor could then bypass Pauma’s counsel
27 and directly contact anywhere from four to two hundred and twenty-eight persons within the Tribe for
28 privileged material or to rally sentiment for a lowball settlement offer. In the words of the Ninth Circuit,

1 “the trust necessary for a successful attorney-client relationship is eviscerated when the client is lured
 2 into clandestine meetings with the lawyer for the opposition.” *U.S. v. Lopez*, 4 F.3d 1455, 1458-59 (9th
 3 Cir. 1993). This is equally true when the meetings are with singular discontented representatives for a
 4 much larger body. Since the fundamental purpose of Rule 2-100 is to “preserve[e]... the attorney-client
 5 relationship and the proper functioning of the administration of justice,” the Court should find that each
 6 of the four Tribal Council members are immunized parties that the attorneys for the State cannot contact
 7 about the substance or the settlement of the litigation without the prior consent of Pauma’s counsel of
 8 record. *Talao*, 222 F.3d at 1138.

9 **C. THE PUBLIC OFFICE EXCEPTION DOES NOT EXEMPT JACOB APPELSMITH FROM RULE**
 10 **2-100’S PROHIBITION ON EX PARTE COMMUNICATIONS.**

11 The drafters of Rule 2-100 inserted an exception to the general prohibition against *ex parte*
 12 communications to ensure a party retains the First Amendment right to petition the government about its
 13 grievances. In specific, the ‘no contact’ rule does not prohibit “[c]ommunications with a public officer,
 14 board, committee, or body.” Rule 2-100(C)(1). The term officer refers to “duly-appointed or elected
 15 public officers of a state, county, township, city or other subdivision of the state, as distinguished from
 16 mere employees thereof.” *Cleland v. Superior Court*, 52 Cal.App.2d 530, 533 (3d Dist. 1942); *see*
 17 Public Office, Black’s Law Dictionary 1230 (6th ed. abridged 1991) (identifying five requirements for a
 18 public office, including the creation of the position through a legislative act, defined duties, a reasonable
 19 degree of permanence, and the ability to act independently); Public Officer, Merriam-Webster.com,
 20 [http://www.merriam-webster.com/dictionary/public officer](http://www.merriam-webster.com/dictionary/public%20officer) (last visited Aug. 12, 2011) (“[A] person
 21 who has been legally elected or appointed to office and who exercises governmental functions.”).

22 None of the particulars of Mr. Appelsmith’s advisory position with the Office of the Governor
 23 raise even the slightest inference that it is a public office. WD, Exs. 15-16 Mr. Appelsmith was not
 24 elected to the position, nor did he go through the Senate confirmation process, which is a necessary step
 25 for receiving a public appointment. WD, Ex. 16; Cal Gov’t Code § 1303 (“Every person who exercises
 26 any function of a public office without taking the oath of office, or without giving the required bond, is
 27 guilty of a misdemeanor.”). As well as being unaccountable to the people of the State, the advisory
 28 position is unpaid and lacks an identifiable job description in the Government Code, previously-issued

Executive Orders, or unofficial informational materials on the Office of the Governor’s website. WD, Ex. 16. Perhaps most importantly, according to its very definition, an advisor does not have the ability to exercise any degree of sovereign authority, as it simply provides “recommendation[s] about what should be done” to another person who can. Advise, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/advisor> (last visited Aug. 13, 2011). These facts taken together lead Pauma’s counsel to believe that Mr. Appelsmith is simply a senior legal advisor for the Governor who does not benefit from the Rule 2-100(C)(1) exception. *See Cleland*, 52 Cal. App.2d at 537 (“[N]either the Legislature nor the board fixed the term of office as required by the Constitution. He was merely appointed to serve as such superintendent at the will of the board. No term was fixed. His duties were not prescribed by the Legislature. These circumstances enforce the conclusion that the Legislature did not intend... to authorize a board of supervisors to create and appoint a [position as] an additional county officer.”).

The State Bar’s perception of the intended meaning of public officer is much the same. In an interim opinion that it has yet to formally adopt, the State Bar indicated the term covers a person “who, for example, has the authority to address, clarify or alter governmental policy; to correct a particular grievance; or to address or grant an exemption from regulation.” *Sierra Pacific*, 759 F.Supp.2d at 1216 (citing Proposed Formal Opinion Interim No. 98-0002 of the State Bar of Cal.). This scope of this language covers “policy-making official[s] or persons with authority to change a policy or grant some specific request for redress that [a complainant] was presenting.” *Id.* at 1217. Regardless of the counter argument, the essential nature of an advisory position ensures that it will always be one seat removed from a position capable of changing governmental policy or redressing prior wrongs.

Additionally, general principles of federal law indicate that this unobstructed line of communication with the government closes upon the filing of a complaint if an implicated public party happens to be an attorney. In litigation, the status of a governmental agency is akin to that of any other organizational party, and thus a private attorney cannot contact an involved official except with the prior approval of the agency or in respect to general policy matters. Restatement (Third) of Law Governing Law. §§ 101(2), 101 cmt. c (2000) (“In any specific-claims representation, contact is permissible with officers of governmental agencies other than the agency specifically involved and with officers of the

governmental agency in question who do not have power to bind the agency with respect to the specific matter.”); *accord* Opinion No. 09-1 of the Florida Bar (Dec. 10, 2010); Opinion No. 812 of the N.Y. State Bar Ass’n (May 3, 2007); Opinion No. 652 of the N.Y. State Bar Ass’n (Aug. 27, 1993). Echoing the remainder of the analysis in this memorandum, the flipside of this rule is that a governmental attorney is similarly precluded from contacting a private litigant without the prior consent of opposing counsel unless the communication relates to an unrelated policy issue. The attempted settlement of a pending lawsuit obviously does not fall within this category. WD, ¶¶ 2, 5-6; Exs. 3-4. As such, the Court should find that Mr. Appelsmith is not a public official who can take advantage of the limited exception to the ‘no contact’ rule, and move on to remedying the situation.

D. THE REQUESTED RELIEF IS CUSTOMARY IN CASES INVOLVING EX PARTE COMMUNICATIONS.

In cases involving *ex parte* communications, courts will typically restrain the offending attorney from having further unauthorized contact with members of the represented party about the subject matter of the litigation, as well as require the disclosure of all evidence pertaining to the prior unethical events. *See Resnick*, 95 F.R.D. at 377 (indicating that the court ordered defense counsel to refrain from communicating with any member of the plaintiff class and to deliver all notes, memoranda, and documents “constituting or referring to any such communication to or from any class member.”); *Sierra Pacific*, No. 09-02445 JAM EFB, Docket No. 92, slip op. at 12:8-11 (E.D. Cal. Nov. 15, 2010) (“[Attorney] must identify all federal employees contacted without the knowledge of counsel for the United States in the matter to date, as well as the dates and circumstances of each contact, and produce originals and copies of all recordings or documents relating to such communications”); *see also McDonnell Douglas*, 32 F.3d at 1257-58; *Hammond*, 167 F.Supp.2d at 1292-93. In the interests of justice, Pauma’s counsel requests the same relief so it can determine whether the State has obtained privileged information that it may subsequently use during future fact-based proceedings as the alleged fruit of a lawful discovery process. Additionally, enjoining the non-policy making attorneys with the implicated State agencies from communicating with Pauma representatives about the lawsuit without the presence or prior approval of the Tribe’s counsel of record is necessary since the State still contends that Rule 2-100 only applies to attorneys whose names appear on the caption of the parties’ filings.

CONCLUSION

For the foregoing reasons, Pauma respectfully requests that the Court: (1) address whether Rule 2-100 applies to Mr. Appelsmith; (2) issue a protective order preventing any non-policy making attorney with the Attorney General's Office, the CGCC, or the Office of the Governor from communicating with representatives of Pauma about the subject matter of the litigation without the presence or prior approval of the Tribe's counsel of record; and (3) require the State to promptly disclose all e-mails, notes, letters, memoranda, and other documents "constituting or referring to any such [prior *ex parte*] communications to or from any" Tribal member. *Resnick*, 95 F.R.D. at 377. Additionally, Pauma further requests that the Court reserve the right to take additional corrective or disciplinary measures based upon the content of the evidence provided.

RESPECTFULLY SUBMITTED this 6th day of September, 2011

THE PAUMA BAND OF MISSION INDIANS

By: /s/ Kevin M. Cochrane

Cheryl A. Williams

Kevin M. Cochrane

caw@williamscochrane.com

kmc@williamscochrane.com

WILLIAMS & COCHRANE, LLP

525 B Street, Suite 1500

San Diego, California 92101

Telephone: (619) 793-4809